No. 22,515

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 899, AFL-CIO; AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL UNION NO. 556, AFL-CIO; INTERTIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 381, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, JOINT COUNCIL OF TEAMSTERS NO. 42; and SAN LUIS OBISPO BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,
Respondents.

INTERVENOR'S REPLY BRIEF

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Subject Index

Table of Authorities Cited

Cases

Statutes

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PRELIMINARY STATEMENT

Respondents appear to make five principal points in their briefs.

Respondents contend:

1. The Board has held that picketing aimed at requiring unorganized employers to adopt the specific benefits contained in area contracts is permissible area standards picketing.

2. Unions have a legitimate interest in requiring unorganized employers to adopt the specific benefits contained in area contracts.

3. What the Board's decision in this case amounts to is that a Union can request an employer to raise its wage rates and employee benefits to area levels only if it is practical and convenient for the employer to do so.

4. The meeting of February 1, 1966, "was a setup" planned by Intervenor's counsel.

5. Intervenor is somehow at fault for not disagreeing with the Unions' definition of area standards.

Respondents' contentions will be answered in the order they have been set forth.

ARGUMENT

The Board has not held that picketing aimed at requiring unorganized employers to adopt the specific benefits contained in area contracts is permissible area standards picketing. What the Board *has* held is that unions may seek to compel unorganized employers to incur costs equal to those of organized employers. Thereby, unorganized employers will be precluded from obtaining a competitive advantage over organized employers. The job security of union members will be protected. See *e. g., International Hod Carriers, etc. (Texarkana Construction Co.),* 138 NLRB 10 (1962).

Respondents' reliance on *Local 741, United Assn. of Journeymen, etc. (Keith Riggs Plumbing and*

Heating Contractor), 137 NLRB 125 (1962), is misplaced. As pointed out in Intervenor's opening brief (page 11), all the union sought in *Riggs* was payment of prevailing wages.

The Board recognized in *Riggs* that "if a union pickets and says to an employer, 'We only want you to pay the prevailing wage scale, but don't want to bargain with you or organize your employees,' and there is no independent evidence to controvert this statement of objective, the Board cannot find that the picketing has organization, recognition or bargaining objectives . . .". There is no quarrel with that. However, in this case Respondents went considerably beyond that.

Where a union seeks to impose on an unorganized employer the identical employment terms and benefits of the union's area contract, then *pro tanto* it is engaged in bargaining.

This is particularly true if what are sought to be imposed are not only present terms and benefits, but future ones as well.

The distinction is pointed up by *Centralia Bldg. & Trades Council v. NLRB,* 363 F.2d 699 (D. C. Cir. 1967). If Intervenor had acceded to Respondents' demands, just as in *Centralia* "very little would (have been) left in the field of collective bargaining" to a representative chosen by its employees.

Both *Riggs* and *Centralia* affirm the decision of a Trial Examiner. The Trial Examiner was William E. Spencer in both cases.

McLeod v. Chefs, Cooks & Pastry Cooks, Local 89 (Stork Club), 280 F.2d 760 (2d Cir. 1960), also cited by Respondents, has to do with the proviso to Section 8(b)(7)(c) of the Act (National Labor Relations Act, 29 U.S.C. Secs. 151 et seq.) permitting informational picketing if deliveries are not interfered with. It is not in point here.

Whether unions have a legitimate interest in requiring unorganized employers to adopt the specific benefits contained in area contracts, is simply another way of stating the same problem. A key point Respondents overlook is that the employees of an unorganized employer might prefer other benefits instead. Instead of *receiving* (Respondents' emphasis) 50¢ per hour more wages and 20¢ per hour more fringe benefits, those employees might prefer 70¢ per hour more wages and no more fringe benefits.

The Board's decision in this case is not that a Union can request an employer to raise its wage rates and employee benefits to area levels only if it is practical and convenient for the employer to do so. There is nothing in the decision to preclude a union from compelling an unorganized employer to incur costs which equal those incurred by organized employers, no matter how hard it hurts.

The Board's decision recognizes, however, that *vis-a-vis* Respondents' request for identical specific benefits, Intervenor was faced with an economically impossible demand. The Trial Examiner on page 13, lines 10-14, of his decision, put it this way. "One need not resort to speculation to conclude that the

comparative cost of equivalent benefits to an individual employer as contrasted with costs to a contract employer under group plans or trusts covering the entire Southern California food industry would necessarily be so greater that it would present a virtual economic impossibility".

In other words, it was not a matter of Intervenor meeting the costs of organized employers. Intervenor was called on to incur *more* costs than organized employers, putting *it* at a competitive disadvantage, one that could be relieved only by signing Respondents' area contracts.

To this is added the practical impossibility of Intervenor providing portability of pension credits.

Meat Cutters' counsel argues that its area contract does not provide for portability. The argument must be made with tongue in cheek.

Portability is provided for in Article I, Sections 1, 2 and 3, of the Declaration of Trust which begins on page 30 of the Meat Cutters' industry agreement (G. C. Exh. No. 3) and in the September 29, 1958, amendment which appears on page 39 of the industry agreement. The provisions on page 30 of the agreement make it clear that the pension plan embraces all signatory employers and their employees within all the areas of the specified Meat Cutters' locals. The amendment on page 39 provides for reciprocal arrangements with Meat Cutters' retirement plans in other areas of California. Because of the statewide reciprocity, the Meat Cutters' agreement in fact af-

fords more portability than does the Retail Clerks' agreement.

Respondents' contention that the February 1, 1966, meeting "was a setup" planned by Intervenor's counsel, must also be made with tongue in cheek. The contention was not made before the Trial Examiner or before the Board. There is nothing in the record to support it. In fact, *Respondents* suggested the meeting and made the arrangements for it. (Tr. 14, 150-151).

Respondents' further contention, that Intervenor is somehow at fault for not disagreeing with the Unions' definition of area standards, is if possible, even more bizarre. A fair summary of the evidence is that Intervenor asked what the standards were, Respondents told Intervenor that the standards were what the area contracts provided for, that the standards could not be modified, and that was it. Respondent Meat Cutters say ". . . the contracts spoke for themselves . . ." (Meat Cutters' brief, page 4). How or why in this circumstance Intervenor was supposed to disagree with Respondents' definition, escapes the writer.

Respondent Meat Cutters' statement that the contracts spoke for themselves in defining benefits belies Respondents' concurrent argument that Intervenor "could (not) reasonably have believed" (Meat Cutters' brief, page 9) that the detailed contract provisions not stricken concerning discharge procedures, seniority, times of store meetings so as not to conflict with union meetings, visits of union representatives

to the stores, discharge of expelled union members, and grievances and arbitration, were being sought.

CONCLUSION

Respondents' arguments amount to little more than an attempt to persuade the court that finding of fact made by the Board on substantial evidence are wrong in the sense that the Board should have resolved conflicts or drawn inferences other than it did. Cf., *NLRB v. Butchers Union, Local 120,* ..... F.2d ..... (9th Cir., Feb. 21, 1968, No. 21,742). Respondents present no sound reason why enforcement of the Board's decision should not be granted.

Dated, Coalinga, California,
July 5, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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